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1. *Larsen v. Benson, 2023 U.S. Dist. LEXIS 154340*

Client/Matter: -None-

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Content Type	Narrowed by
Cases	Court: U.S. Federal

Larsen v. Benson

United States District Court for the District of Minnesota

July 21, 2023, Decided; July 21, 2023, Filed

Case No. 11-cv-3025 (ADM/ECW)

Reporter
2023 U.S. Dist. LEXIS 154340 *; 2023 WL 5753632

Daniel Larsen, Plaintiff, v. Dennis Benson, Lucinda Jesson, Greg Carlson, Kevin Moser, David Prescott, Janine Hebert, Tom Lundquist, Elizabeth Barbo, Dana Osborne, Kelly Minor, Rob Rose, Linda Berglin, Mark Dayton, and Anoka County Social Services Kurt Neir, Sued each in their individual capacity and in their official capacity as employees of the Minnesota Department of Human Services, Defendants.

Core Terms

cause of action, official capacity, allegations, Defendants', pleadings, motion to dismiss, asserts, recommending, claim preclusion, rights, confinement, immunities, appointment of counsel, conditions, sanctions, policies, Counts, district court, cleaned, custody, motion for judgment, deprived plaintiff, injunctive relief, county employee, final judgment, Consolidate, litigated, residents, waived, Cases

Counsel: **[*1]** Daniel Larsen, Plaintiff, Pro se, Moose Lake, MN.

For Dennis Benson, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Lucinda Jesson, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Mr. Greg Carlson, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Kevin Moser, sued each in their individual capacity as employees of the Minnesota Department of Human Services, David Prescott, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Janine Hebert, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Tom Lundquist, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Elizabeth Barbo, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Dana Osborne, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Kelly Minor, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Rob Rose, **[*2]** sued each in their individual capacity as employees of the Minnesota Department of Human Services, Linda Berglin, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Mark Dayton, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Defendants: Aaron Winter, LEAD ATTORNEY, Minnesota Attorney General's ***Office***, St Paul, MN.

For Kurt Neir, Anokta County Social Services, sued each in their individual capacity as employees of the Minnesota Department of Human Services, Defendant: Jason J Stover, LEAD ATTORNEY, Anoka County Attorney's ***Office***, Anoka, MN.

Judges: ELIZABETH COWAN WRIGHT, United States Magistrate Judge.

Opinion by: ELIZABETH COWAN WRIGHT

Opinion

ORDER AND REPORT & RECOMMENDATION

This matter is before the Court on Defendant Kurt Neir's Motion for Judgment on the Pleadings (Dkt. 41); Defendants' Motion to Dismiss Plaintiff's Complaint (Dkt. 48); Plaintiff's Motion to Not Dismiss the Complaint (Dkt. 57)[1] ; Plaintiff's Motion to Consolidate Cases (Dkt. 61); and Plaintiff's Motion for the Appointment of Counsel

[1] The Court notes that while this is framed as a Motion, it is a memorandum in opposition to the State Defendants' Motion to Dismiss.

(Dkt. 82). This case has been referred to the undersigned United States Magistrate Judge for decisions on pre-trial **[*3]** matters and to issue a report and recommendation on dispositive motions pursuant to *28 U.S.C. § 636* and Local Rule 72.1. For the reasons stated below, the Court recommends granting the Motion for Judgment on the Pleadings, granting the Motion to Dismiss and denying Plaintiff's request for *Rule 11* sanctions.[2] The Court also denies the Motion to Consolidate Cases and the Motion for the Appointment of Counsel.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Operative Complaint

Plaintiff Daniel Larsen ("Larsen" or "Plaintiff"), a patient of the Minnesota Department of Human Services ("DHS"), is currently involuntarily committed to the care and custody of DHS as a sexually dangerous person pursuant to Chapter 253B, and is confined at the Minnesota Sex Offender Program ("MSOP") at Moose Lake, Minnesota. (Dkt. 1 ¶ 1.) DHS has not provided Larsen a date certain by which he will be released from the care and custody of DHS or confinement at MSOP. (*Id.* ¶ 21.)

Plaintiff alleges that the fourteen Defendants acted in their individual and official capacities as employees of DHS in all respects material to this action. (*Id.* ¶ 17.) That said, Plaintiff has also named Kurt Neir ("Neir") an Anoka County employee and Social Services Supervisor, as **[*4]** a Defendant. (*Id.*) The Court will refer to the Defendants other than Neir as the "State Defendants."

Larsen's 75-page, and over 238-paragraph, Complaint alleges the following Causes of Action against Defendants, which incorporate every preceding paragraph:

1. First Cause of Action: Failure to Provide Treatment

Defendants failed to provide Plaintiff the best available and most qualified treatment with an intent to punish him, in ***violation*** of his rights, privileges, and immunities guaranteed by the Fifth and *Fourteenth Amendments to the United States Constitution*; article I, sections 2, 5, 6, and 7 of the Minnesota Constitution, and Chapter 2538, of the Minnesota Civil Commitment & Treatment Act. (*Id.* ¶¶ 178-180.)

2. Second Cause of Action: Unreasonable Restrictions on Free Speech

Defendants' actions constitute unreasonable and unwarranted restrictions on Plaintiff s right to freedom of speech and expression and his right to freedom of religion with an intent to punish him, in ***violation*** of his rights, privileges, and immunities guaranteed by the *First Amendment to the United States Constitution*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 181-183.)

3. Third Cause of Action: Unreasonable Searches and Seizures

Defendants' actions constitute unreasonable searches and seizures with an intent to punish Plaintiff, in ***violation*** of his rights, privileges, and immunities guaranteed by the Fourth and *Fifth Amendments to the United States Constitution*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 184-186.)

4. Fourth Cause [*5] of Action: Invasion of Privacy

Defendants' actions constitute unreasonable and gross invasions of Plaintiff's privacy with an intent to punish him, in ***violation*** of his rights, privileges, and immunities guaranteed by the Fourth and *Fifth Amendments to the United States Constitution*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 187-189.)

5. Fifth Cause of Action: Denial of Access to Legal Materials and Counsel

Defendants' actions deprived Plaintiff of his constitutional right to legal materials and right to counsel in ***violation*** of his rights, privileges, and immunities guaranteed by the First, Fourth, Fifth, and *Sixth Amendments to the United States Constitution*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 190-192.)

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[2] The Court notes that no motion was filed with respect to the request for sanctions. Instead, Plaintiff raised the issue of sanction in his Memorandum of Law in Support of Plaintiff's Motion for Sanctions. (*See* Dkt. 71.)

6. Sixth Cause of Action: Denial of the Right to Liberty

Defendants' actions deprived Plaintiff of his constitutional right to liberty in ***violation*** of his rights guaranteed under the Fourth, Fifth, Sixth, and *Fourteenth Amendments to the United States Constitution*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 193-195.)

7. Seventh Cause of Action: Denial of the Right to Religion and Religious Freedom

Defendants' actions deprived Plaintiff of his constitutional right to his religious freedom in ***violation*** of his rights guaranteed under the First, Fifth, and *Fourteenth Amendments to the United States Constitution*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 196-198.)

8. Eighth Cause of Action: Denial of Less Restrictive Alternative

Defendants' actions deprived Plaintiff of his constitutional right to a less restrictive **[*6]** alternative placement in ***violation*** of rights guaranteed under the First, Fifth, and *Fourteenth Amendments to the United States Constitution*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 199-201.)

9. Ninth Cause of Action: Cruel and Unusual Punishment

Defendants' actions deprived Plaintiff of his right to be free from cruel and unusual punishment under the First, Fifth, and *Fourteenth Amendments to the United States Constitution*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 202-204.)

10. Tenth Cause of Action: Right to Be Free from Double Jeopardy

Defendants' actions deprived Plaintiff of his right to be free from double jeopardy under the First, Fifth, and *Fourteenth Amendments to the United States Constitution*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 205-207.)

11. Eleventh Cause of Action: Denial of Due Process in *Violation* of *14th Amendment*

Defendants' actions deprived Plaintiff of his right to due process under the *Fourteenth Amendment to the United States Constitution*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 208-210.)

12. Twelfth Cause of Action: Conspiracy to Deny Due Process in *Violation* of *14th Amendment* and *42 U.S.C. § 1985(3)*

Defendants conspired to deprive Plaintiff of his right to due process under the *Fourteenth Amendment to the United States Constitution* and *42 U.S.C. § 1985*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 211-213.)

13. Thirteenth, Fourteenth, and Sixteenth Causes of Action: State Causes of Action

Plaintiff asserts a number of state common law causes of action, including intentional infliction of emotional distress; negligent infliction of emotional distress; and negligent hiring and credentialing. (*Id.* ¶¶ 214-219, 223-225.) **[*7]**

14. Fifteenth Cause of Action: Obligation of Contracts

Defendants' actions violated the *Contracts Clause, United States Constitution article I, section 10, clause 1*; *Minnesota Constitution, article I, section 2*, or *Minnesota Constitution article XII*; and article I, sections 2, 5, 6, and 7 of the Minnesota Constitution. (*Id.* ¶¶ 220-222.)

15. Seventeenth Cause of Action: Totality of the Conditions

Plaintiff alleges that Defendants' conduct has made Plaintiff suffer the totality of the conditions in ***violation*** of the *Fourteenth Amendment*. (*Id.* ¶¶ 226-228.)

16. Eighteenth Cause of Action: Supervisor Liability

Plaintiff asserts that Defendants have made him suffer because of their failure to supervise their employees in ***violation*** of the *Fourteenth Amendment*. (*Id.* ¶¶ 239-231.)

17. Nineteenth Cause of Action: *Violation* of the Police Powers of the State

Plaintiff alleges that Defendants are in ***violation*** of the abuse of *parens patriae* powers of the state in ***violation*** of the *Tenth Amendment of the United States Constitution*. (*Id.* ¶¶ 232-234.)

18. Twentieth Cause of Action: *Violation of the Oath* of *Office*

In his final cause of action, Plaintiff alleges that the conduct of Linda Berglin and Mark Dayton violated their ***Oath*** of ***Office*** in ***violation*** of *article 6, 3 [sic] of the United States Constitution*. (*Id.* ¶¶ 236-238.)

Plaintiff is seeking relief for these causes of action in the form of compensatory damages, punitive damages, declaratory relief, and injunctive relief.

B. *Karsjens* and the Stay

On January 25, 2012, the present case was stayed pending **[*8]** certification of a class in *Karsjens v. Harpstead*, Case No. 11-cv-03659 ("*Karsjens*"). (Dkt. 23.) On July 24, 2012, United States District Judge Donovan Frank certified the *Karsjens* plaintiff class, which included Larsen, as the class definition was "[a]ll patients currently civilly committed in the Minnesota Sex Offender Program pursuant to Minn. Stat. § 253B." (11-cv-03659, Dkt. 203 at 11.) The gravamen of the operative Third Amended Complaint ("TAC") in *Karsjens* dealt with the allegations that Minn. Stat. §253D is unconstitutional on its face and as applied to the plaintiffs and class members because the nature and duration of commitment under that statute is not reasonably related nor narrowly tailored to the purpose of commitment; and alleged ***violations*** of the plaintiffs' and class members' constitutional, statutory, and common law rights to (1) receive proper care and treatment, best adapted, according to contemporary professional standards, (2) be free from punishment in ***violation*** of those rights, (3) have less restrictive confinement, (4) be free from inhumane treatment in ***violation*** of those rights, (5) have religious freedom, (6) have free speech and association, (7) be free from unreasonable searches and seizures, **[*9]** and (8) be free from an invasion of privacy. (11-cv-3659, Dkt. 635 ¶ 1.)

The TAC also detailed the lack of treatment for rehabilitation purposes for residents of the MSOP; alleged improper discipline and punishment suffered by MSOP residents, including delaying delivery of mail; denying residents a library and law library; depriving them of recreational activities and exercise; restricting what can be bought from the inmate store; denying educational programming; denying employment; denying access to the yard; closing inmates in their cell; removing furniture; taking away visiting rights and the lack of due process involved; providing a non-therapeutic environment; improper cell conditions; double bunking; improper strip searches, including when residents leave or re-enter the perimeter of a MSOP facility; the fact that residents were subject to random cell searches, monitoring of telephone calls, shackling and other physical restraints; opening of correspondence; inadequate medical treatment; the inability to keep personal computers; limitations on visitation; limited employment opportunities; an inadequate diet; limiting and censoring publications or portions thereof; keeping residents **[*10]** who have filed lawsuits separate from other residents; religious restrictions; and the lack of an opportunity to be released from MSOP. (11-cv-3659, Dkt. 365 ¶¶ 85-205.)

The TAC in *Karsjens* asserted the following thirteen counts: (I) the Minnesota Commitment and Treatment Act ("MCTA") (Minn. Stat. chapter 253D) is facially unconstitutional; (II) the MCTA is unconstitutional as applied; (III) failure to provide treatment in ***violation*** of the *Fourteenth Amendment*; (IV) failure to provide treatment in ***violation*** of the MCTA; (V) denial of the right to be free from punishment; (VI) denial of the right to less restrictive alternative confinement; (VII) denial of the right to be free from inhumane treatment; (VIII) denial of religious freedom; (IX) unreasonable restrictions on free speech and free association; (X) unreasonable searches and seizures; (XI) ***violations*** of court ordered treatment; (XII) breach of contract; and (XIII) tortious interference with contractual rights and intentional ***violation*** of *Minn. Stat. § 253B.03. subd. 7*. (11-cv-3659, Dkt. 635 ¶¶ 226-352.) These claims were asserted against the defendants in their official capacities. (*Id.* ¶ 1.)

Upon the defendants' motion to dismiss in *Karsjens*, the district court dismissed Counts IV, XI, XII, and XIII with prejudice on April 10, 2015. (11-cv-3659, **[*11]** Dkt. 1005.) In the first *Karsjens* appeal, the Eighth Circuit entered judgment in the defendants' favor as to Counts I and II. *See Karsjens v. Piper, 845 F.3d 394, 410-11 (8th Cir. 2017)* ("*Karsjens I*"). On remand, the district court subsequently dismissed Counts III, V, VI, and VII with

prejudice and granted summary judgment on the remaining claims, Counts VIII, IX, and X without prejudice. (11-cv-3659, Dkt. 1108 at 42.)

The Eighth Circuit reversed the dismissal of Counts V, VI, and VII and remanded them for reconsideration under a different standard. *See* Karsjens v. Lourey, 988 F.3d 1047, 1053-54 (8th Cir. 2021) ("*Karsjens II*") ("On remand, the district court is instructed to consider the claim of inadequate medical care under the deliberate indifference standard outlined in *Senty-Haugen*, and to consider the remaining claims under the standard for punitive conditions of confinement outlined in *Bell*.").

On remand, the district court again dismissed with prejudice the remaining claims — Counts V, VI, and VII. *See* Karsjens v. Harpstead, No. CV 11-3659 (DWF/TNL), 2022 U.S. Dist. LEXIS 31842, 2022 WL 542467, at *18 (D. Minn. Feb. 23, 2022). On July 13, 2023, the Eighth Circuit affirmed the dismissal with prejudice of Counts V, VI, and VII. *Karsjens v. Harpstead* ("*Karsjens III*"), No. 22-1459, --- F.4th ----, 2023 WL 4537942 (8th Cir. July 13, 2023).

The stay was lifted in this matter on October 3, 2022, and the Court ordered Defendants to submit a new response to the Complaint. (Dkts. 39, 40.) The State Defendants again brought a **[*12]** Motion to Dismiss and Neir brought the Motion for Judgment on the Pleadings, which are now before the Court (Dkts. 41, 48), and the Court gave Larsen the opportunity to file responses (Dkts. 47, 54).

II. LEGAL STANDARD

A. *Rule 12(b)(6)* Motion to Dismiss

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the pleadings are construed in the light most favorable to the non-moving party, and the facts alleged in the complaints must be taken as true. *See* Ashley Cty., Ark. v. Pfizer, Inc., 552 F.3d 659, 665 (8th Cir. 2009). In addition, a court must afford the plaintiff all reasonable inferences from those allegations. *See* Blankenship v. USA Truck, Inc., 601 F.3d 852, 853 (8th Cir. 2010). At the same time, to withstand a motion to dismiss under Rule 12(b)(6), litigants must properly plead their claims under Federal Rule of Civil Procedure 8 and meet the principles articulated by the United States Supreme Court in *Iqbal* and *Twombly*.

Under Rule 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The pleading standard articulated by Rule 8 "does not require detailed factual allegations, but it [does demand] more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks and citations omitted). A "pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action **[*13]** will not do.'" *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Thus, to "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting Twombly, 550 U.S. at 556). "[T]he plausibility standard, which requires a federal court complaint to 'state a claim for relief that is plausible on its face, . . . asks for more than a sheer possibility that a defendant has acted unlawfully." Ritchie v. St. Louis Jewish Light, 630 F.3d 713, 717 (8th Cir. 2011) (internal quotation and citation omitted). Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679 (citation omitted).

Following Twombly and consistent with Iqbal, the Eighth Circuit explained:

> While a plaintiff need not set forth detailed factual allegations or specific facts that describe the evidence to be presented, the complaint must include sufficient factual allegations to provide the grounds on which the claim rests. **A district [*14] court, therefore, is not required to divine the litigant's intent and create claims that are not clearly raised, and it need not conjure up unpled allegations to save a complaint**.

Gregory v. Dillard's, Inc., 565 F.3d 464, 473 (8th Cir. 2009) (cleaned up) (emphasis added). *Pro se* complaints are construed liberally, but they still must allege sufficient facts to support the claims advanced. *See* Stone v. Harry, 364 F.3d 912, 914 (8th Cir. 2004) (citations omitted).

B. *Rule 12(c)* Judgment on the Pleadings

As discussed above, Defendant Neir seeks judgment on the pleadings under Federal Rule of Civil Procedure 12(c). (Dkt. 41.)

Pursuant to Rule 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "In considering a motion for judgment on the pleadings under Rule 12(c), the court views 'all facts pleaded by the nonmoving party as true and grants all reasonable inferences in favor of that party.'" Yang v. City of Minneapolis, Civil No. 21-2658 (ADM/ECW), 607 F. Supp. 3d 880, 2022 WL 2160425, at *3 (D. Minn. June 15, 2022) (quoting Poehl v. Countrywide Home Loans, Inc., 528 F.3d 1093, 1096 (8th Cir. 2008)) (cleaned up). "As the Eighth Circuit held in Westcott, because motions to dismiss for failure to state a claim are subject to the same legal standard whether brought under Rule 12(b)(6) or Rule 12(c), the distinction is purely formal." Radcliffe v. Securian Fin. Group, Inc., 906 F. Supp. 2d 874, 883 (D. Minn. 2012) (quoting Ali v. Frazier, 575 F. Supp. 2d 1084, 1089 (D. Minn. 2008) (citing Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990)) (cleaned up). "Judgment on the pleadings is appropriate 'where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of **[*15]** law." Yang, 2022 WL 2160425 at *3 (quoting Faibisch v. Univ. of Minn., 304 F.3d 797, 803 (8th Cir. 2002)). "[T]he court generally must ignore materials outside the pleadings, but it may consider 'some materials that are part of the public record or do not contradict the complaint,' as well as materials that are 'necessarily embraced by the pleadings.'" Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1080 (8th Cir. 1999) (citations omitted).

III. ANALYSIS - MOTION TO DISMISS AND NOT TO DISMISS

In their Motion to Dismiss, the State Defendants make myriad arguments, including that: the Complaint violates Rule 8(a)(2)'s requirement that Plaintiff set forth a short plain statement of the case and the Complaint does not allege the personal involvement of any Defendant, and that Causes of Action 1-4, 6-12, 15, and 17 of the Complaint against Defendants in their official capacities should be dismissed as barred under claim preclusion because they were addressed and dismissed in *Karsjens*. (Dkt. 50 at 7-13.) Further, Defendants argue that claim preclusion also bars all potential official capacity claims based on facts also alleged in *Karsjens*, not only the stated causes of action. (*Id.* at 12-15.) In addition, Defendants claim that issue preclusion further bars every issue actually litigated and determined in *Karsjens* as to all Defendants with respect to the **[*16]** individual capacity claims. (*Id.* at 16-17.) Finally, Defendants contend that all of the federal causes of action fail to state a claim for relief, they are entitled to qualified immunity, any monetary damages against them in their official capacities are barred by the Eleventh Amendment; and the Court should decline supplemental jurisdiction as to the state law claims. (*Id.* at 17-33.)

In his opposition, Plaintiff focuses in large part on arguments that Defendants' counsel acted unethically during the *Karsjens* litigation because counsel omitted that Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982), instead of Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), was the correct standard that should have been applied with respect to the claims in *Karsjens*, and Plaintiff asserts that he should be allowed to apply that standard to the claims in the present action. (Dkt. 57 at 2-5.) Plaintiff further asserts that Defendants', and their counsel's, malicious positions in their motion violates Rule 11 of the Federal Rules of Civil Procedure and appears solely based on their malicious intent to keep him unlawfully oppressed under the guise of "treatment" for lifelong hospitalization. (*Id.* at 6-7.) The remainder of Plaintiff's arguments primarily counters the Defendants' claims with respect to the application of claim preclusion to the claims in his present **[*17]** Complaint. (*Id.* at 7-10.)

Larsen failed to respond to Defendants' arguments in his opposition with respect to their arguments that issue preclusion further bars every issue actually litigated and determined in *Karsjens* as to all Defendants with respect to the individual capacity claims; all of the federal causes of action fail to state a claim for relief, they are entitled to qualified immunity, any monetary damages against them in their official capacities are barred by the Eleventh Amendment; and the Court should decline supplemental jurisdiction as to the state law claims. As such, Larsen has waived any arguments opposing the Motion in this regard. *See Tate v. Scheidt*, No. 15-3115 (WMW/JSM), 2016 WL 7155806, at *6 (D. Minn. Oct. 7, 2016), *R.& R. adopted*, 2016 WL 7175593 (D. Minn. Dec. 7, 2016) ("When presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action. The federal courts will not invent legal arguments for litigants.") (cleaned up); *see also* Johnson v. Bank of New York Mellon, No. 22-CV-2848 (ECT/LIB), 2023 U.S. Dist. LEXIS 7362,

2023 WL 204088, at *4 (D. Minn. Jan. 17, 2023)) ("Moreover, Johnson has not provided any legal basis to oppose the Bank's arguments for dismissal of this claim, and thus any such arguments have been waived."). As such, the Complaint should be dismissed on this basis.

A. *Rule 8* Pleading

Further, as argued by Defendants, under *Rule 8*, a complaint must contain "a short and plain statement **[*18]** of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*; *Gurman v. Metro Hous. & Redev. Auth., 842 F. Supp. 2d 1151, 1152 (D. Minn. 2011)* ("A complaint must be concise, and it must be clear."). It is Larsen's burden, "under both *Rule 8* and *Rule 11*, to reasonably investigate [his] claims, to research the relevant law, to plead only viable claims, and to plead those claims concisely and clearly, so that a defendant can readily respond to them and a court can readily resolve them." *Gurman, 842 F. Supp. 2d at 1153*. As the *Gurman* court noted:

> This Court has repeatedly criticized the filing of "kitchen-sink" or "shotgun" complaints—complaints in which a plaintiff brings every conceivable claim against every conceivable defendant. Such complaints are pernicious for many reasons. *See Davis v. Coca—Cola Bottling Co. Consol., 516 F.3d 955, 981 (11th Cir. 2008)* ("The unacceptable consequences of shotgun pleading are many."). For one thing, complaints like the one in this case unfairly burden defendants and courts. The plaintiff who files a kitchen-sink complaint shifts onto the defendant and the court the burden of identifying the plaintiff's genuine claims and determining which of those claims might have legal support. In this case, for example, plaintiffs have essentially coughed up an unsightly hairball of factual and legal allegations, stepped to the side, and invited the defendants **[*19]** and the Court to pick through the mess and determine if plaintiffs may have pleaded a viable claim or two.

Id. (footnote omitted) (dealing with a 60-page and almost 250-paragraph complaint).

That is exactly the problem faced by the Court and Defendants with respect to Larsen's 75-page, and over 238-paragraph, Complaint, with largely conclusory causes of action that incorporate every preceding paragraph. This has placed "an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage." *Richards v. Dayton, No. CIV. 13-3029 JRT/JSM, 2015 U.S. Dist. LEXIS 40478, 2015 WL 1522199, at *10 n. 10 (D. Minn. Jan. 30, 2015)*, *R. & R. adopted sub nom.* *2015 U.S. Dist. LEXIS 39946, 2015 WL 1522237 (D. Minn. Mar. 30, 2015)* (dealing with a pro se complaint) (citing 5 Wright and Miller, Federal Practice and Procedure § 1281, p. 522).

Larsen has invited the Court to act as his counsel to piece together viable claims, which the Court cannot do even though Larsen is acting pro se. *See Gregory, 565 F.3d at 473*. Further, "judges are not like pigs, hunting for truffles buried in briefs or Complaints." *Adams v. Sch. Bd. of Anoka-Hennepin Indep. Sch. Dist. No. 11, No. CIV. 02-991 RHK/AJB, 2002 U.S. Dist. LEXIS 22444, 2002 WL 31571207, at *3 (D. Minn. Nov. 18, 2002)* (cleaned up); *see also Richards, 2015 WL 1522199, at *10 n.10*. Moreover, Larsen makes little effort to differentiate between any of the 13 State Defendants named in this action, with all causes of action brought with respect to every Defendant in their personal capacities (except **[*20]** for ***Violation of the Oath*** of ***Office*** claim against Linda Berglin and Mark Dayton)[3] and no facts alleged to show which, if any, of the Defendants might have actually engaged in the specific conduct giving rise to the claims. *See S.M. v. Krigbaum, 808 F.3d 335, 340 (8th Cir. 2015)* ("Government officials are personally liable only for their own misconduct."). "[T]hese shotgun-style allegations cannot support § 1983 claims against the individual Defendants." *Bishop v. Swanson, No. 12-CV-135 (KMM/DTS), 2023 U.S. Dist. LEXIS 21350, 2023 WL 1786468, at *6 (D. Minn. Jan. 24, 2023)*, *R. & R. adopted*, *No. 12-CV-135 (KMM/DTS), 2023 U.S. Dist. LEXIS 43241, 2023 WL 2523902 (D. Minn. Mar. 15, 2023)*. For all of these reasons, and for the additional reasons set forth below, the Complaint should be dismissed without prejudice, unless the Court recommends dismissal with prejudice on other grounds identified in this Report and Recommendation.

B. Official Capacity Claims

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[3] The Court notes that "the ***oaths*** that government officials take in assuming their ***office*** do not create a private cause of action." *Pittman v. Swanson, No. 11-CV-3658 (PJS/TNL), 2023 U.S. Dist. LEXIS 41336, 2023 WL 2404044, at *21 (D. Minn. Jan. 27, 2023)*, *R. & R. adopted*, *2023 U.S. Dist. LEXIS 31615, 2023 WL 2238703 (D. Minn. Feb. 27, 2023)* (citing *Caldwell v. Obama, 6 F. Supp. 3d 31, 47 (D.D.C. 2013)*).

As stated previously, the State Defendants argue that Plaintiff's claims for damages in their official capacities should be dismissed because such claims are barred by the Eleventh Amendment. (Dkt. 50 at 33.) It appears that Plaintiff is asserting monetary damages against Defendants in their individual capacities, making the Motion in this regard moot. That said, to the extent that Larsen is seeking monetary damages against the individual MSOP Defendants in their official capacities, such claims for damages **[*21]** are precluded by the Eleventh Amendment. The Eleventh Amendment states that the Court's jurisdiction does not "extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ." U.S. Const. amend. XI. The Eleventh Amendment also "bars suits against a State by citizens of that same State as well." Papasan v. Allain, 478 U.S. 265, 276, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) (citation omitted). The Eleventh Amendment generally bars suits for monetary damages against a State, unless that immunity has been waived by the State or expressly abrogated by Congress. *See* Alsbrook v. City of Maumelle, 184 F.3d 999, 1005 (8th Cir. 1999).

Further, the Supreme Court has held that official capacity suits "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" Kentucky v. Graham, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690, n.55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). In other words, a suit against a state official in his or her official capacity "is no different from a suit against the State itself." Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (citation omitted). "The Eleventh Amendment bars such suits unless the State has waived its immunity." *Id.* at 66. The State of Minnesota has not waived its sovereign immunity. *See* Faibisch v. Univ. of Minnesota, 304 F.3d 797, 800 (8th Cir. 2002). Thus, Larsen's claims against Defendants in their official capacities for money damages, as well as for declaratory relief related to past conduct, are barred by the Eleventh Amendment and the claims should be dismissed without prejudice. *See* Herta v. McBride, No. CV 21-1956 (DSD/HB), 2021 U.S. Dist. LEXIS 209856, 2021 WL 5001792, at *2 (D. Minn. Sept. 30, 2021), *appeal dismissed*, No. 21-3353, 2022 U.S. App. LEXIS 7184, 2022 WL 802694 (8th Cir. Jan. 4, 2022), *cert.* ***[*22]*** *denied*, 142 S. Ct. 2713, 212 L. Ed. 2d 781 (2022) ("The Eleventh Amendment therefore strips the court of jurisdiction over Herta's § 1983 claims, and the court dismisses those claims without prejudice.").

The Court acknowledges that under the doctrine established in Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), "state officials may be sued in their official capacities for prospective injunctive relief when the plaintiff alleges that the officials are acting in ***violation*** of the Constitution or federal law." Mo. Child Care Ass'n v. Cross, 294 F.3d 1034, 1037 (8th Cir. 2002) (citing Ex parte Young, 209 U.S. at 159-60); *see* Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002) ("In determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint alleges **an ongoing *violation* of federal law and seeks relief properly characterized as prospective**.") (emphasis added) (cleaned up). However, the exception is "narrow"; it **"applies only to prospective relief"** and **"does not permit judgments against state officers declaring that they violated federal law in the past**." P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993) (emphasis added) (citing Green v. Mansour, 474 U.S. 64, 73, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985) ("[T]he issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.")); *see also* Care Comm. v. Arneson, 638 F.3d 621, 632 (8th Cir. 2011) ("Under the *Ex Parte Young* doctrine, a private **[*23]** party can sue a state officer in his official capacity to enjoin a prospective action that would violate federal law.") Moreover, the state official must have "some connection with the enforcement of the [challenged] act." Reprod. Health Servs. of Planned Parenthood v. Nixon, 428 F.3d 1139, 1145 (8th Cir. 2005) (citing Ex parte Young, 209 U.S. at 157).

The Complaint is problematic with respect to Plaintiff's claims for prospective relief against Defendants in their official capacities for the same reasons set forth above regarding the causes of actions asserted against Defendants. Any claims for prospective relief violate Rule 8(a)(2) and Rule 11, and also seek vague prospective relief to remedy the purported myriad acts of wrongdoing. (*See, e.g.*, Dkt. 1 ¶¶ 162, 168, 237, 238, Prayer for Relief ¶¶ 10-11.) Even assuming that Larsen had colorable claims that policies in place at the MSOP when he filed this action might have unlawfully infringed the constitutional rights of MSOP clients, it is possible such claims have been mooted by changes to those policies and practices over the intervening decade. *See*

Jackson v. Ellison, No. 12-CV-0550 (JRT/ECW), 2023 U.S. Dist. LEXIS 19134, 2023 WL 1767829, at *1 (D. Minn. Jan. 17, 2023) (citation omitted), *R. & R. adopted*, 2023 U.S. Dist. LEXIS 18120, 2023 WL 1767302 (D. Minn. Feb. 3, 2023) ("Insofar as Jackson seeks injunctive relief from the defendants in their official capacities, he cannot bring claims that necessarily imply the wholesale invalidity of his civil detention, **[*24]** and any claims seeking injunctive relief from specific policies in place at the facility where Jackson was detained when he filed this action may have become moot due to Jackson's subsequent transfer to prison."); *see also* Pittman, 2023 WL 2404044, at *25-26 ("There is also a more practical concern: To the extent that plaintiffs seek prospective relief from policies in place at MSOP in 2011 or 2012, it is doubtful that that those policies remain in effect, at least in all respects. Many aspects of plaintiffs' remaining claims for injunctive relief have likely become moot as a result of these policy amendments, as MSOP has altered procedures to take account of client concerns or the direction of courts of this District.") (footnote omitted). Indeed, it is not apparent that the same Defendants are still in a position with respect to the enforcement of the challenged acts.[4] *See* Reprod. Health Servs., 428 F.3d at 1145.

Counts 1-4, 6-12, 15, and 17 of the Complaint, to the extent they assert claims against MSOP Defendants in their official capacities, are also barred on the additional basis that they have already been litigated as part of the *Karsjens* litigation.

The Eighth Circuit has explained the applicability of claim preclusion and its elements **[*25]** as follows:

> Under federal common law, the doctrine of res judicata, or claim preclusion, applies when "(1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action." Costner v. URS Consultants, Inc., 153 F.3d 667, 673 (8th Cir. 1998). "[W]hether two claims are the same for res judicata purposes depends on whether the claims arise out of the same nucleus of operative fact or are based upon the same factual predicate." Murphy v. Jones, 877 F.2d 682, 684-85 (8th Cir. 1989). Under the doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980).

Elbert v. Carter, 903 F.3d 779, 782 (8th Cir. 2018).

The Court finds that the *Karsjens* court was a court of competent jurisdiction and that *Karsjens* resulted in a final judgment. *See* Bishop v. Swanson, No. 12-CV-135 (KMM/DTS), 2023 U.S. Dist. LEXIS 21350, 2023 WL 1786468, at *8 (D. Minn. Jan. 24, 2023), *R. & R. adopted*, 2023 U.S. Dist. LEXIS 43241, 2023 WL 2523902 (D. Minn. Mar. 15, 2023) ("*Karsjens* has culminated in a final judgment on the merits, and that case features no plausible jurisdictional question."). While the appellate process may not be exhausted in *Karsjens*, claim preclusion applies to a final judgment even if it is subject to an appeal unless the appeals court reverses **[*26]** the lower court. *See* Magee v. Hamline University, 1 F. Supp. 3d 967, 975 n.5 (D. Minn. 2014) (quoting Dickinson v. Ewing (In re Ewing), 852 F.2d 1057, 1060 (8th Cir. 1988)), *aff'd*, 775 F.3d 1057 (8th Cir. 2015) ("It is well established in the federal courts that 'the pendency of an appeal does not diminish the res judicata effect of a judgment rendered by a federal court.'"). That said, the Eighth Circuit recently upheld the district court's decision in *Karsjens*, bolstering the jurisdictional and final judgment factors, and in fact noting that "because Appellants **waived** the application of the Youngberg professional judgment standard by failing to raise it in their last appeal, the district court did not err by not applying it." *Karsjens III*, --- F.4th ---- at ----, 2023 WL 4537942, at *6 (emphasis added).

While Plaintiff argues that there is no privity in the context of Youngberg and injunctive relief as to the level of care (Dkt. 57 at 9), "'privity' is 'merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within res judicata,'" Elbert, 903 F.3d at 782

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[4] By way of example, the Complaint lists Defendant Lucinda Jesson as Commissioner of the Minnesota Department of Huma Services (Dkt. 1 ¶ 5), however, the present Commissioner is Jodi Harpstead. *See* https://mn.gov/dhs/media/executive-staff-bios/ (last visited July 21, 2023); *see also* Fed. R. Civ. P. 12(d); Zean v. Fairview Health Servs., 858 F.3d 520, 526 (8th Cir. 2017) (considering information that is part of the public record on a Rule 12 motion). Similarly, Defendant Mark Dayton is no longer the Governor of the State of Minnesota, and Linda Berglin is no longer a member of the Minnesota Legislature, as alleged in the Complaint. *See* https://www.lrl.mn.gov/legdb/fulldetail?id=10047 (last visited July 21, 2023).

(cleaned up). Courts in this District have concluded that where the remaining defendants, like those in the present case, are sued in their official capacities, and are sued in connection with their alleged roles and responsibilities as representatives of MSOP, the element of privity is satisfied. *See* Greene v. Benson, No. 11-CV-979 (JRT/DJF), 2023 U.S. Dist. LEXIS 96961, 2023 WL 3815422, at *5 (D. Minn. June 5, 2023); *see also* ***[*27]*** Micklus v. Greer, 705 F.2d 314, 317 (8th Cir. 1983) (quotation omitted).

Because Larsen was among the class members pursuing relief in *Karsjens* (11-cv-3659, Dkt. 203 at 11), any official capacity constitutional claims in this action duplicative of those litigated in *Karsjens* dealing with the conditions and treatment at MSOP are now barred by the doctrine of claim preclusion and should also be dismissed on this additional basis. *See* Jamison v. Ludeman et al., 11-cv-2136 (PAM/DTS), 2023 U.S. Dist. LEXIS 26916, 2023 WL 2088302, at *2 (D. Minn. Feb. 17, 2023) (finding claim preclusion as to similar claims); *Allen v. Jesson*, 11-cv-1611-ADM-LIB (ECF No. 58) (D. Minn. March 27, 2023) (same)), *R & R. adopted* (Dkt. No. 67) (D. Minn. April 27, 2023). Larsen focuses his claim by contending that Youngberg was not addressed by the district court in *Karsjens* even though it was so instructed by the Eighth Circuit:

> And yes, these victims are entitled to a 'second bite of the apple,[5] under Youngberg. ***See, e.g.***, Gov't of Ghana v. ProEnergy Servs., LLC, 677 F.3d 340, 344 (8th Cir. 2012) (observing "appellate review of a district court's discovery rulings is both narrow and deferential" and will not be reversed "absent a gross abuse of discretion resulting in fundamental unfairness in the trial of the case" (internal alterations and quotation marks omitted)). Especially when a higher court such as the Eighth Circuit specifically instructed a lower court like the District of Minnesota to use the analysis under the ***totality of the circumstances*** ***[*28]*** of [plaintiffs'] confinement, but failed to do it is something more than just abuse of discretion.
>
> Consequently, it would be a waste of the courts [sic] time and resources to continue to litigate these cases on the grounds that the case will be brought back under the Youngberg holding and the ***totality of the circumstances*** of [plaintiffs'] confinement.

(Dkt. 57 at 9-10.) In this regard, the fact "that counsel in *Karsjens* did not argue for the application of the correct legal standard"—does not affect the Court's conclusion. Claim preclusion arises from the operative facts and claims asserted in the prior matter, not the parties' arguments made therein." Greene, 2023 WL 3815422, at *7 (footnote and citation omitted).

To the extent that Larsen's remaining official capacity claims throughout the Complaint are arguably different than those raised in *Karsjens*, including those in Cause of Action 5 (Denial of access to legal materials and counsel), 18 (Supervisor Liability under the Fourteenth Amendment), 19 (***Violations*** of Police Power under the Tenth Amendment), and 20 (***Violation of the Oath*** of ***Office***) they are nevertheless barred, as claims that arise "out of the same nucleus of operative facts as the prior claim" are precluded. Yankton Sioux Tribe v. U.S. Dep't of Health & Hum. Servs., 533 F.3d 634, 641 (8th Cir. 2008) (citation omitted); *see also* Plough v. W. Des Moines Comm. Sch. Dist., 70 F.3d 512, 515 (8th Cir. 1995) ("[A] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been **[*30]** raised in that action.") (cleaned up). Further, there is no need to parse through the 75-page, 238-paragraph Complaint for potentially viable claims left unconnected to any stated

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[5] The Court notes that despite noting the harsh effects of waiver, the Eighth Circuit has already rejected the assertion that it instructed the district court to apply Youngberg and rejected a request for a "second bite at the apple":

> Appellants attempt to circumvent the above analysis by suggesting that this Court's passing reference to Youngberg in *Karsjens II* directed the district court to apply the professional-judgment standard on remand. This reads too much into the prior panel's opinion. While *Karsjens II* references Youngberg, it does so for the sole purpose of acknowledging that civilly committed persons are guaranteed protections under the Due Process Clause—the same proposition that Appellants cited the case for in briefing that appeal. *See* 988 F.3d at 1051-53. Indeed, this Court **[*29]** explicitly instructed the district court to apply the *Bell* standard, going so far as to quote language from *Bell*, not Youngberg. *See* id. at 1053-54. More telling, if Appellants truly thought that *Karsjens II* directed the application of Youngberg, it would have made arguments based on that jurisprudence before the district court. Instead, they argued for the standard that they requested before the prior panel: the *Bell* standard. Appellants are not permitted a second bite at the apple simply because their claims failed before the district court under their proposed standard.

Karsjens III, *supra*, at *5.

cause of action as it is clear that Plaintiff "has merely presented different legal claims which spring from the same set of facts as *Karsjens*." *Jamison, 2023 WL 2088302, at *2* (marks and citation). Both the *Karsjens* TAC and the present Complaint are based on broad allegations regarding the conditions of commitment at MSOP in 2011. (*Compare Karsjens* TAC ¶¶ 1, 16, *with* Dkt. 1 (both complaints describing themselves as advancing broad, generalized challenges to treatment, conditions, and policies within MSOP).) Therefore, because Larsen's remaining official capacity claims arise from the same nucleus of facts as those asserted in *Karsjens*, they are barred under the doctrine of claim preclusion and should be denied on this additional basis with prejudice. *Greene, 2023 WL 3815422, at *8*.

For all of the reasons stated above, the Court finds that the State Defendants' Motion to Dismiss should be granted.

IV. ANALYSIS — MOTION FOR JUDGMENT ON THE PLEADINGS

Larsen asserts the same allegations of misconduct against all Defendants, including Neir (Outside of the Twentieth Cause **[*31]** of Action-which does not pertain to Neir), appears to regard their responsibilities and roles with respect to his treatment equally, and asserts that he is suing all Defendants, including, "in their individual capacities and in their official capacities **as employees of DHS**." (Dkt. 1 ¶ 17 (emphasis added).) Similarly, Plaintiff alleges that "all defendants acted under color of law and under color of their authority **as officers and employees of DHS or DOC**." (*Id.* ¶ 19 (emphasis added).) However, Plaintiff admits that Neir, unlike the State Defendants, "is employed by Anoka County" and not by DHS, DOC or any other State agency. (*Id.* ¶ 17.)

Plaintiff further alleges that Neir has "supervisory authority and responsibility for the administration and operation of Human Services," for promulgating, implementing and approving all welfare policies, for training all "Social Services" personnel, "for the custody and treatment of Mr. Larsen[,]" and that Neir is "a member of the clinical team" who knew or should have known about the various MSOP policies and practices that have harmed Plaintiff and "directly participated in and exercised reasonably close supervision of the personnel who are responsible **[*32]** for the deprivation of Mr. Larsen's constitutional rights." (*Id.*) Outside of these conclusory allegations, there is no explanation of how Neir—in his capacity as a Social Services Supervisor for Anoka County—could have had any authority to impact MSOP policy and practice or any capacity to affect Larsen's treatment or conditions of confinement at that facility.

There are no other allegations in the Complaint specific to Neir. Nowhere in the Complaint is any allegation that Neir specifically made any decision or participated directly in any misconduct that caused injury to Larsen, and instead, Plaintiff lumps him in with all the other Defendants with respect to myriad assertions of malfeasance.

Neir argues that judgment on the pleadings is appropriate because Larsen has failed to plead a facially plausible claim for relief against him, the lone Defendant not associated with the State of Minnesota, as all of the causes of action arises out of the conditions he alleges exist in the MSOP, including that he personally participated in the design or implementation of the MSOP policies or conditions that Larsen challenges. (Dkt. 42 at 6-9.) Neir asserts that Larsen's inclusion of his name in **[*33]** a "laundry list" of Defendants is not sufficient, as Larsen needs to allege actual facts related to Neir that raise his right to relief above a speculative level that would allow this Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. (*Id.* at 9.)

Plaintiff counters that Neir's Motion fails because he did not provide any evidence showing he is not responsible for harm suffered by Plaintiff at MSOP and Neir had a basic duty to protect Plaintiff and at least check into his well-being for his proper level of care. (Dkt. 56 at 3.) This includes an argument that Anoka County owed a duty to protect Larsen based on a "special relationship" and that the "State-created-danger doctrine" does apply in this case given that Anoka County placed him in a position of danger by having him civilly committed with the State. (*Id.* at 6-10.) According to Larsen, "defendants from Anoka" were "to monitor MSOP staff in assuring that they provide plaintiff Larsen with those needed services for his release. But remain complicit to the denial of these federally protected rights under *Youngberg*." (*Id.* at 11.)

Similar to the claims against the State Defendants, Larsen's Complaint **[*34]** fails to satisfy *Rule 8*'s requirements regarding Neir, as it is neither short nor plain, it spends only one paragraph setting forth specific allegations against Neir, and otherwise groups Neir with the State Defendants, which deal with conduct at the

MSOP, making the allegations not plausible with respect to Neir as a county employee. *See* Greene, 2023 WL 2496509, at *3 (dealing with similar claims and allegations involving MSOP actors and a Sherburne County employee); *see also* Patten v. Schultz, No. 19-CV-1210 (SRN/ECW), 2022 U.S. Dist. LEXIS 180318, 2022 WL 4803071, at *4 (D. Minn. Oct. 3, 2022) ("Nowhere does the complaint plausibly allege that Schultz, an employee of ACHHS, has any role in operating or maintaining MSOP, a facility operated by the State of Minnesota. . . . [E]ven taking every plausible allegation in the complaint as true, Schultz cannot be said to be personally responsible for any of those conditions.") (dealing with an Atkin County defendant).

With respect to official capacity claims, the Court also recommends dismissal of such claims because the Complaint alleges that the Defendants were acting in their official capacities as DHS or DOC employees, but at the same time acknowledges that Neir was a County employee. *See* Greene, 2023 WL 2496509, at *3. The Complaint fails to plausibly explain why or how Neir has the authority to change the MSOP policies **[*35]** at issue in this action. *See Gardner v. Minnesota*, No. 16-CV-03999-JNE-KMM, 2019 WL 1084714, at *15 (D. Minn. Jan. 15, 2019), *R. & R. adopted*, 2019 U.S. Dist. LEXIS 36409, 2019 WL 1086338 (D. Minn. Mar. 7, 2019) ("The Court agrees with the defendants that the facts alleged suggest that neither Ninneman nor Gordon could provide the prospective injunctive relief Mr. Gardner seeks in his Complaint. Nothing in the record here indicates that even if Mr. Gardner prevailed at trial, Ninneman or Gordon would be in a position to carry out an injunction 'ordering Defendants State of Minnesota, DHS, and MSOP to implement new policies and training which prohibit and discourage unjustified and unreasonable strip searches of MSOP clients.'").

Similarly, the individual capacity claims fail because Larsen has failed to plead sufficient plausible factual matter to state a claim for relief because he does not allege exactly how Neir, as an Anoka County employee, could have been involved in the alleged misconduct at the MSOP (outside of conclusory assertions). *See* Greene, 2023 WL 2496509, at *4. To the extent that Plaintiff is asserting through his opposition a theory that Neir or Anoka County are liable to him because they owed a duty to protect him based on a "special relationship," Larsen makes no such allegation in his Complaint. There is a duty to act for the protection of another if a **[*36]** special relationship exists between the parties and risk at issue is foreseeable. *Id.* (citing Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 168-69 (Minn. 1989)). A special relationship can arise from where an individual has "'custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection' or [ ] where an individual assumes responsibility for a duty owed by one individual to another." *Id.* at 4 (quoting Bjerke v. Johnson, 742 N.W.2d 660, 665 (Minn. 2007)). As argued by Neir, the facilities where Larsen is in custody are operated by the State. (Dkt. 64 at 5, 7.) Indeed, Larsen admits in his Complaint that he "is currently involuntarily committed to the care and custody of DHS pursuant to 2538. And presently is confined at the Minnesota Sex Offender Program." (Dkt. 1 ¶ 1.) In other words, Plaintiff alleges that he is in the custody of the State of Minnesota, as opposed to Anoka County, and therefore Plaintiff does not plausibly allege that Neir had custody of him for the purposes of a special relationship or for that matter that any risk was foreseeable. *See* Greene, 2023 WL 2496509, at *5.

Further, the Complaint does not support Larsen's assertion in his opposition that the "State-created-danger doctrine" applies. To succeed on such a theory, Larsen must prove:

> (1) [T]hat **[*37]** [he] was a member of a limited, precisely definable group, (2) that the municipality's conduct put [him] at a significant risk of serious, immediate, and proximate harm, (3) that the risk was obvious or known to the municipality, (4) that the municipality acted recklessly in conscious disregard of the risk, and (5) that in total, the municipality's conduct shocks the conscience.

Fields v. Abbott, 652 F.3d 886, 890-91 (8th Cir. 2011) (marks and citations omitted) (applying the doctrine to county employees). Here, as argued by Neir, it appears that Larsen is claiming (Dkt. 56 at 6-10) that Neir placed him into a situation of a significant risk of serious, immediate, and proximate harm as the result of his civil commitment without monitoring as a means to challenge that commitment. (Dkt. 64 at 2-4.) Such an argument is an ancillary challenge to the legality of his civil commitment and therefore barred by the favorable termination rule articulated in Heck v. Humphrey, 512 U.S. 477, 512 (1994). *See* Patten 2022 WL 4803071, at *4. Moreover, he does not plausibly allege how a county employee knew about a substantial risk of harm at a State facility. As such, the Court finds that Plaintiff has failed to plausibly allege that the state-created-danger doctrine applies. *See* Greene, 2023 WL 2496509, at *6. ("Nor does Greene allege any facts that plausibly **[*38]** show Fahnhorst was aware of facts at the time he took

any alleged conduct from which he could draw the inference a substantial risk of harm existed in the MSOP. Further, he does not allege that Fahnhorst actually drew such an inference from any potential facts.").

For all of these reasons, the Court finds that Neir's Motion for Judgment on the Pleadings should be granted, and the claims against him should be dismissed without prejudice.

V. LARSEN'S REQUEST FOR SANCTIONS

Plaintiff asserts that the State Defendants and Neir's counsel should be sanctioned in conjunction with the motions for dismissal in this action. (Dkt. 71.) Pursuant to *Rule 11(b) of the Federal Rules of Civil Procedure*, attorneys certify that pleadings, motions, and papers are not being presented for improper purposes, the factual contentions have evidentiary support, and that the claims and legal assertions contained therein are warranted by existing law. *Fed. R. Civ. P. 11(b)*. Sanctions may be imposed if the Court determines that *Rule 11(b)* has been violated. *Fed. R. Civ. P. 11(c)*.

Here, Plaintiff asserts that Defendants' supporting papers are "frivolous" and were filed "with the malicious intent to keep plaintiff unlawfully oppressed for lifelong hospitalization." (Dkt. 71 at 5.) However, given that the Court is recommending **[*39]** dismissal of this action based on the Motions, the Court cannot find that *Rule 11* sanctions are appropriate on this basis.

Plaintiff also seeks sanctions based on his argument that counsel acted in bad faith in asserting that the *Karsjens* plaintiffs did not ask for application of the *Youngberg* professional judgment standard before the *Karsjens* district court. (Dkt. 71 at 5.) However, Larsen does not identify where Defendants made such a representation in the pleadings related to the present Motion. While the State Defendants' counsel may have made such representation to the Eighth Circuit, as set forth above, the Eighth Circuit has now found that Plaintiffs did indeed waive reliance on *Youngberg*. (*See supra*, fn. 5.)

Further, Plaintiff appears to argue that counsel should be sanctioned under *Rule 11 of the Federal Rules of Civil Procedure* because he failed to mention with respect to Defendants' claim preclusion arguments that claims addressed in *Karsjens* are not the same as those in the present case, returning to the argument that counsel in *Karsjens* did not argue for the application of the correct legal standard as set forth in *Youngberg*. (Dkt. 71 at 5.) Even to the extent that *Karsjens* applied an incorrect legal standard, which is disputed, and counsel in *Karsjens* ***[*40]*** did not argue for the application of the correct legal standard, this has no bearing on claim preclusion. As stated previously, claim preclusion arises from the operative facts and claims asserted in the prior matter, not the parties' arguments made therein." *Greene*, 2023 WL 381542 2, at *7 (citation omitted).

Accordingly, the Court recommends denying Larsen's Request for *Rule 11* sanctions.

VI. NON-DISPOSITIVE MOTIONS

A. Plaintiff's Motion to Consolidate Cases (Dkt. 61)

Larsen seeks consolidation of this case with other civil rights cases involving civilly committed persons, namely: *Brown v. Ludeman, et al.*, D. Minn. Case No. 11-cv-02859 (JRT/ECW); *Greene v. Benson, et al.*, D. Minn. Case No. 11-cv-0979 (JRT/TNL); *Jamison v. Ludeman et al.*, D. Minn. Case No. 11-cv-02136 (PAM/DTS); *Allan v. Jesson, et al.*, D. Minn. Case No. 11-cv-01611 (ADM/LIB); *Scott* N. 11-cv-3714; *Hartleib*, No. 12-cv-0344; and *White v. Dayton, et al.*, D. Minn. Case No. 11-cv-03702. (Dkt. 61.)

Since the Court is recommending dismissal of the present action and the majority of cases that Plaintiff seeks to have consolidated have been dismissed or are subject to a Report and Recommendation recommending dismissal, there is no basis to order consolidation at this **[*41]** time. *See Fed. R. Civ. P. 42*. Therefore, the Motion is denied as moot.

B. Motion for the Appointment of Counsel (Dkt. 82)

Plaintiff filed the present Motion for Appointment of Counsel after the briefing had been completed on Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings. Plaintiff asserts that counsel is necessary given the complexity of the issues in this case; his ability to investigate has been hampered given his confinement; the issue of having to deal with credibility issues between witnesses; his inability to present the case because he has no legal training; and the merits of the present action. (Dkt. 83 at 3-6; Dkt. 84.)

In civil proceedings, there is no constitutional nor statutory right to appointed counsel. *See* Ward v. Smith, 721 F.3d 940, 942 (8th Cir. 2013). However, "[i]n civil rights matters the court may, pursuant to 28 U.S.C. § 1915, 'request' an attorney to represent a party if, within the court's discretion, the circumstances are such that would properly justify such a request." Mosby v. Mabry, 697 F.2d 213, 214 (8th Cir. 1982). Relevant factors in determining whether appointment of counsel is appropriate are the factual complexity of the case, the complexity of the legal arguments, the ability of the litigant to present her claims, and whether both the parties and the **[*42]** Court would benefit from the indigent being represented by counsel. *See* Phillips v. Jasper Cnty. Jail, 437 F.3d 791, 794 (8th Cir. 2006) (citing Edgington v. Missouri Dep't of Corr., 52 F.3d 777, 780 (8th Cir. 1995), *abrogated on other grounds,* Doe v. Cassel, 403 F.3d 986, 989 (8th Cir. 2005)); Johnson v. Williams, 788 F.2d 1319, 1322 (8th Cir. 1986) (quoting Nelson v. Redfield Lithograph Printing, 728 F.2d 1003, 1005 (8th Cir. 1984)).

Here, the Court finds that the appointment of counsel is not warranted because: the Court cannot conclude that this matter is factually or legally complex; Plaintiff has demonstrated at least a baseline ability to litigate in federal court; Plaintiff did not seek appointment of counsel until after briefing was complete on the Motion to Dismiss; and because the Court is recommending dismissal of the action, which alleviates any difficulties related to litigating from MSOP and dealing with credibility of witnesses. For these reasons, the Court denies the motion for appointment of counsel.

VII. ORDER

Based on the files, records, and proceedings herein, **IT IS ORDERED THAT**:

1. Plaintiff's Motion to Consolidate Cases (Dkt. 61) is **DENIED** as moot; and

2. Plaintiff's Motion for the Appointment of Counsel (Dkt. 82) is **DENIED**.

VIII. RECOMMENDATION

Based on the foregoing, and all of the files, records, and proceedings herein, **IT IS HEREBY RECOMMENDED THAT**:

1. Defendant Kurt Neir's Motion for Judgment on the Pleadings (Dkt. 41) be **GRANTED** and that the claims against him be **DISMISSED [*43] WITHOUT PREJUDICE**;

2. Defendants' Motion to Dismiss (Dkt. 48) be **GRANTED**;

3. Plaintiff's Motion to Not Dismiss to Not Dismiss the Complaint (Dkt. 57) be **DENIED**;

4. That claims for monetary damages against the State Defendants in their official capacities be **DISMISSED WITHOUT PREJUDICE**;

5. That the prospective relief sought against the State Defendants sought in their official capacities be **DISMISSED WITH PREJUDICE**;

6. That the remainder of the claims against the State Defendants be **DISMISSED WITHOUT PREJUDICE**; and

7. Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Sanctions (Dkt. 71) be **DENIED**.

/s/ Elizabeth Cowan Wright

ELIZABETH COWAN WRIGHT

United States Magistrate Judge

Dated: July 21, 2023